

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 11, ORIGINAL.

STATE OF LOUISIANA, COMPLAINANT,

VERSUS

STATE OF MISSISSIPPI, DEFENDANT.

BRIEF FOR THE DEFENDANT AND CROSS-COMPLAINANT.

*To the Honorable, the Chief Justice and the Associate Justices
of the Supreme Court of the United States.*

For a statement of the facts of this case the court is referred to the brief filed for the State of Mississippi by associate counsel.

Under Section 3 of article IV of the Federal Constitution, the Congress alone has authority to create states and fix their boundaries. In the exercise of this authority the Congress passed the Acts of 1812 and 1817 creating the States of Louisiana and Mississippi. These two said Acts are supposed to contain a description of the boundaries of the two States; it is to them we have to look for correct answers to the questions raised in this controversy. Everything is valuable in this investigation only in so far as it may aid in the ascertainment of the truth from these two statutes.

And not only is the authority of Congress in creating states and fixing their original boundaries exclusive, but boundaries cannot be changed, in view of this same section of the Constitution, without the consent of the Congress. Even the Legislatures of the states by joint, deliberate action, cannot change

boundary lines without the concurrence of the Congress. The Union retains this power over its members for reasons which are obvious.

Hence, the Department of the Interior through the Land Office, cannot determine boundaries between two states by confirming lands to the one state or the other. That the Land Office, in the year 1852, approved certain lands in the disputed territory to Louisiana is not a fact to be taken into consideration here, unless, in some way, it may throw light upon the meaning of the said Acts of 1812 and 1817.

Nor can it affect the issue here that numerous map-makers have drawn their lines so as to place this disputed territory within the limits of one or the other of these two States. Map-makers and cartographers have no authority to fix or change state boundaries. They can only depict their individual conclusions as to where a line really is.

In the same category are the offered opinions of various persons as to the correct location of the boundary line in the waters between the two States, whether such opinions are entertained by witnesses for Louisiana or Mississippi. Such persons, having opinions, cannot supplant nor supersede the Congress in its high function of state-making. They cannot, by taking thought, add a cubit to the domain of any state, nor can they by any sort of mental exertion take anything from the declarations of the Congress as to where and how a line shall be drawn.

Proof of the exercise of jurisdiction by the governments of the two States over the disputed territory is pertinent only in so far as it may appear that such exercise of jurisdiction is connected with or grew out of the accepted meaning of the laws when they were passed. So far, the exercise of such jurisdiction may be regarded as a continued expression of what was at the time well understood. The two governments could not agree upon a change and make it effective. They could not change the boundaries by encroachment on the part of the one State and concession on the part of the other. What they could not do by a solemn compact, they could not do by indirection or by inaction resulting from ignorance or mere supineness.

The same test of relevancy must be applied to the offered

proof of long possession by citizens of one of the two States. Neither the citizens of the States, nor the States themselves, can locate or change the line between them. If their occupation is of such long standing and was begun under such circumstances as to make it referable to the well understood contemporaneous meaning of the said statutes then this testimony is of value. But the doctrine of prescription cannot be utilized in this controversy. The law may presume that long possession was preceded by a valid grant from the party attacking the right of possession. But such presumption cannot be invoked against one of the States interested in this controversy when the grant which would have to be presumed is of the kind which the State could not have made originally. Neither State will be presumed to have done something which it had no power to do. This contention is not in conflict with any expression of this court in state boundary adjudications. In *Missouri v. Iowa*, ————U. S., 12 L. ed., 658, consideration was given to long possession by one party and acquiescence for the same period by the other, but Iowa was treated as the successor of the United States, and the prescriptive rights, if any, had arisen when the interested parties were the State of Missouri and the United States, parties who could make and accept grants. In *State of Indiana v. State of Kentucky*, 136 U. S., 479, 34 L. ed., 329, the court considered the fact that Kentucky had, since her creation, exercised jurisdiction over Green River Island, yet the fact was used for the purpose of showing the original line, that is, the meaning of the terms used in the Act of Congress creating the State of Kentucky, and in the cession by Virginia to the United States of the territory out of which Indiana was formed. The long possession was not regarded as having changed the original line, nor as having established a line not intended by the Virginia grant or the Act of Congress, but it was considered as proof of the original intention and of the ancient boundary. The same is true of the holding of this court in *State of Virginia v. State of Tennessee*, 148 U. S., 503, 37 L. ed., 537, 544, in which case the court gave effect to an agreement of long standing between the two States on the ground that such agreement was conclusive of the correctness of that particular location of the line. "The line so established takes effect, not as an alienation of territory, but as a definition of the true and ancient boundary."

The boundary line between these two States in the waters between them is now what it was in 1817. It has not been changed by the United States Land Office; by the Legislatures of the two States; by the map-makers and cartographers; by the historians and civil engineers; by the speculations of geologists; by the resolutions of boundary commissions; by agreements between boards of oyster commissioners; by the civil authorities of the two States; by the acts of the citizens of the two States who have taken possession of part of the territory in dispute; nor has it been changed by the action of the winds and waves. It was firmly established by the Congress, the only power having such original authority; it could not be changed but with the concurrence of that same power. The boundary of Louisiana in the waters of the Gulf in 1812 is the boundary now.

"In looking at transactions so remote, we must, as far as practicable, view things as they were seen and understood at the time they transpired. There is no other test of truth and justice, which applies to the variable conditions of all human concerns." *Rhode Island v. Massachusetts*, 4 How., 591, 11 L. ed., 1116. "Her (Kentucky's) dominion and jurisdiction continue as they existed at the time she was admitted into the Union, unaffected by the action of the forces of nature upon the course of the river. The question then becomes one of fact: Did the waters of the Ohio pass between Green River Island and the mainland of Indiana when Kentucky became a State and her boundaries were established?" *State of Indiana v. State of Kentucky supra*. The single purpose of this inquiry is to find out what the Congress intended; what has been done since 1812 and 1817, or what has happened since those dates, is of value to the extent that it aids in the discovery of this truth. And in the consideration of the question, What did the Congress intend? the court will try to view the territory in dispute as it was seen by the lawmaking body in 1812. It will be necessary to know what information that body had before it—what history, what maps, what general or official information. All such information possessed by an intelligent public, available to the Congress at the time, a part of the history of the country, would be considered by this court even if no proof of it had been offered here. *Lewis' Sutherland on Statutory Construction* (2nd ed.) Sec. 462, and authorities cited in note 65.

We apprehend that this court, in pursuit of the inquiry as to what was intended by the authors of the statutes, and in applying the statutes to the situation as it appeared to the Congress in 1812, will give little weight to the concessions, if any, in the pleadings, made by counsel for these States, since the line as declared by the Congress in these Acts could not be changed by any concession, agreement or mistake on the part of the counsel for the two parties litigant. And we assume, too, that if the prayer of neither bill nor cross-bill should be granted, this court will construe the laws involved, apply them to the facts as they may now appear to have existed in 1812, and give specific directions by which the line may be marked, as was done in *Missouri v. Iowa*, 7 How., 660, 12 L. ed., 861. It is a case in which the parties cannot speak finally as to their rights, hence their counsel could waive no substantial rights nor bind them by any blunder or concession.

The foregoing preliminary suggestions are intended to indicate our idea of the importance of section 3, article IV of the Constitution in defining clearly the real issue before the court, and of its value as an alembic to separate the good from the bad in this record. Starting here we know we have started right.

We will assume, too, for the purpose of this presentation, that there is occasion to invoke rules of construction. The two statutes are not readily reconciled. The presence of these parties in court demonstrates that fact. An effort, at a glance, to say to whom an island within six leagues of the Mississippi and within three leagues of the Louisiana coast belongs, will make the difficulty prominent. It is impossible to give Louisiana the islands within three leagues of her eastern mainland, and at the same time give Mississippi those within six leagues of her mainland, as the eastern mainland of Louisiana is defined by either party hereto. It is impossible to give effect in detail to the contentions of both States, although both parties stand upon these statutes. It is an occasion for the court to restore order between the two enactments and apply them so as to accomplish the great pervading purpose of Congress despite the appearance of physical details unknown to the lawmaking body.

Looking forward from the safe and sound position that, from the judicial standpoint, the sole object of this litigation is to ascertain what the Congress intended in the enactment of the statutes erecting the two States, we direct the court's attention to one large rule of statutory construction which, in our judgment, is of controlling importance here. We select the statement of the rule made by Sutherland: "The presumption is that the law-maker has a definite purpose in every enactment, and has adopted and formulated the subsidiary provisions in harmony with that purpose; that these are needful to accomplish it; and that if they have the intended effect, they will, at least, conduce to effectuate it. * * * * This intention affords a key to the sense and scope of minor provisions. From this assumption proceeds the general rule that the cardinal purpose or intent of the whole Act shall control, and that all the parts be interpreted as subsidiary and harmonious." This rule is of such frequent use as to be generally applied without being stated.

In the case at bar the general purpose of the enactments is large and clear. Whatever doubt may arise from a consideration of isolated parts are resolvable by reference to the general intent. The country was a waste; it had not been surveyed nor settled; only its continental outline was known; the meanders of the shore line, the location and extent of bays and lakes and other arms of the sea were not known; the authors of the statutes could not be accurate and consistent in detail; but the general object and the controlling intention may be known, and inaccuracies of detail will be dealt with by this court so as to make every part of the laws contribute to the success of the larger plan. It is this familiar rule of construction we especially invoke to harmonize and give effect to the Acts of 1812 and 1817. Chief Justice Marshall recognized its peculiar value as applied to controversies of this kind when he said "in great questions which concern the boundaries of states, where great natural boundaries are established in general terms, with a view to public convenience, and the avoidance of controversy, we think the great object, where it can be distinctly perceived, ought not to be defeated by those technical perplexities which may sometimes influence contracts between individuals." *Handly v. Anthony*, 5 Wheat., 374, 5 L. ed. 113.

II.

The General Purpose of the Authors of the Acts of 1812 and 1817.

A majority of the members of the two Congresses that passed these laws were from states facing on the Atlantic. They all knew the value to a state of a frontage on the water. They could not look at a map of the original thirteen states without observing that they had been so laid off as to give to each its front door opening upon the sea. They knew the value of navigable waters, and of the wealth in and under the waters; they knew the value of ports and harbors, and the expediency of giving each state jurisdiction over the water adjacent to its land territory. They knew how sovereignties have universally contended for the shores of great waters. Engaged in state-making, in dividing a continent, they will be presumed to have kept this large object in view. "It is assuredly the incumbent duty of the General Government to make such a partition of its territories on the waters of the Mississippi, as will combine with local advantages a due regard to national policy. These essential objects cannot, in the opinion of your committee, be secured without a suitable division of the seacoast, acquired by the purchase of Louisiana." *Report of Committee of House of Representatives, on proposed admission of Mississippi Territory, in December, 1811. Am. St. Papers (Miscellaneous) Vol. 21, p. 163.* And in fact one of the strong arguments used by the people of West Florida, in their application to be annexed to the Mississippi Territory, of date November 20, 1811, in compliance with which application West Florida was annexed to said Territory, was that "by the addition the Mississippi Territory will derive the advantage of an extensive sea coast, of which she will otherwise be deprived." R. p. 2003. If this court had read neither of the Acts creating the two States, but had been informed of the general outline of the territory to be divided up into states, we submit that you would expect to find that Congress was moved by the considerations of expediency and right so universally recognized and that it erected states and fixed their boundaries so as to give to each a fair portion of the advantages derivable from a frontage on the open sea and jurisdiction over adjacent waters for a certain distance in front of the land territory. A glance at a map convinces one that, in a general way, the authors of these statutes

were moved by these large considerations. Alabama is 290 miles north and south, with about 40 miles of sea coast. Mississippi is 325 miles north and south with 72 miles of water front on the Mississippi Sound. Louisiana is about 230 miles, at its greatest length north and south, and claims more than 500 miles of water front.

In section VIII of the cross-bill filed by Mississippi in this cause appears the following:

"That the Congress of the United States, in the early history of the Republic, in dealing with the Gulf coast or shore and carving states out of the Louisiana purchase, was not perfectly familiar with said coast or shore line, and, as is shown by the several Acts of Congress, creating the Gulf States, respectively, treated the said Gulf coast or shore as a line running generally from east to west, and the said states were intended to be formed and bounded, and, in the contemplation of Congress, were in fact so formed and bounded, as to give to each state jurisdiction over the waters adjacent to its shore or coast for a certain specified distance southward from its mainland line; that it was not intended to give any state jurisdiction over waters adjacent to and immediately south and in front of any other state or territory."

This allegation needs no proof. It only attributes to the members of Congress the simple virtue of fairness, and an acquaintance with the natural laws of convenience and right. *Vattel's Law of Nations* p. 125 *et seq.* It assumes that the members of that body desired to do right; that they intended to give the people of one state no abnormal share of benefits universally esteemed to be of great value. It takes for granted that the Congress intended to do the sensible and natural thing; that it did not intend to embarrass one state or territory by giving jurisdiction over waters which regularly belonged to it and as a matter of convenience and expediency should belong to it, to another state. To say they did not intend thus to divide up the sea-front among the several states is equivalent to saying that the members of that body did not take into consideration the advantages to be derived to any state from a frontage on the open sea. But it is a matter of history that it was proposed to divide the territory embracing what is now Alabama and Mis-

Mississippi by a line running east and west. The line was at last run north and south so as to make both states extend to the sea. In the effort to provide this open sea-front for Alabama and Mississippi, the Congress stretched them out so as to overcome the numerous bays and the Mississippi sound and give them their outlook upon the Gulf—a door opening into the wide world. The usual three miles from the mainland was not sufficient. This would have dropped their line within the Sound still hedged in by islands and still without a view of the high seas. The lines were drawn so as to reach out to the Gulf proper and embrace the intervening islands.

The Congress knew something of the recession of the mainland north of Mississippi sound from the Gulf line running from east to west and tried to save to the two States their ocean frontage by giving them six leagues from the shore. It was not necessary to extend the Mississippi line this far south if the only purpose was to embrace the small islands between the Gulf and mainland north and east of the present Cat Island Channel, because these islands are only about half way between the mainland and the 6-league limit. It seems to have been the large purpose to give these states jurisdiction over the same ocean domain as they would have had if the mainland extended to the line of islands. It was intended that these States, Alabama and Mississippi, should lose none of the usual open sea territory by reason of the presence of Mississippi sound and the bays. This Sound and the bays were not treated as the open sea. Mississippi sound is, on an average about three leagues wide from north to south. Mississippi's rightful and intended ocean territory should measure three leagues from about the southern shore of Mississippi sound, which line now coincides with the line drawn three leagues from the shore of the mainland. These said Gulf States were created looking southward; they face south. The Congress did not know that a part of the mainland of the Island of New Orleans extended quite as far east as it really did and does. The west shore of what is now called Nine Mile bayou was thought to be on the same meridian with the most eastern mouth of Pearl river. The said river was thought to be on the line of the most eastern mainland boundary of the Island of New Orleans and of the mainland of the new State of Louisiana. The line of the eastern Gulf boundary of the new

State of Louisiana was intended to be the line of the eastern boundary of the addition made north of Lake Borgne. It was not thought, of course, that an island could be within six leagues of the north shore of Mississippi sound east of Pearl river, south of the mainland, and at the same time within three leagues of the coast of the State of Louisiana, referred to in the Act creating the latter State.

If the court should find that we are correct in our position that it was the pervading and controlling purpose of the authors of these statutes to create and bound these States so as to give to each the advantage of property in and jurisdiction over the waters immediately south and in front of the mainland, then the large plan of the Congress can be executed without friction and with certainty. All the parts of the two statutes may be made to harmonize and every detail will be permitted to make its contribution to effectuate the general purpose. *It needs only to do, with perfect and exact information, what the Congress in 1812 undertook to do with crude and false information.* It needs only to do now what the Congress tried to do then; to apply the Acts to the modern situation so as to achieve the original purpose; to construe the laws so their purpose will not fail, although they were based upon misinformation.

But this large purpose of the lawmakers is thwarted by any construction of the Acts which cuts down the water front of Mississippi to two-thirds of the coast line, and reduces her water territory by at least one-third, and, to the same extent, unequally and abnormally increases the water territory of Louisiana, and gives to Louisiana an extent of water front far greater than was contemplated. It will be presumed that the Congress intended to make no such unequal division of these great advantages.

III.

In pursuit of our inquiry as to what Congress intended, we will ascertain, as far as possible, what material the lawmakers were dealing with. What information did the members of Congress have before them in 1812? What information as to the

now disputed territory was available in 1817? How far does the discovery of the extent and character of that information aid in the solution of the problems in hand? Do the two Acts of Congress, considered in the light of the information then accessible, show the presence of the overruling purpose to divide the Louisiana Purchase into states in such a way as to give to each state jurisdiction over the high seas immediately south and in front of its mainland?

In the large problem this record presents to the court there is one known quantity, to-wit: *the shore line of Mississippi*. That line is known with certainty. There are no conflicting contentions as to the point on the mainland, "due south" of of the "northwest corner of the County of Washington," nor as to the point of the "most eastern junction of Pearl river with Lake Borgne." Between these two points, along the mainland, is the shore line of Mississippi, all the islands within six leagues of which were, under the Act of 1817, to belong to that State. No nice distinction is necessary to be made between the words coast and shore. A few yards north or south of any line claimed as the shore line between these two points would not give rise to any controversy. The line runs east and west. It was known in 1817, as it is today, and there has never been the slightest uncertainty as to the point of either extremity. This suit was not filed for the purpose of ascertaining it more definitely. No proof has been taken to establish any point of it. Nor is it questioned by counsel for Louisiana that this is the line from which measurements are to be made to determine whether a given island is within the limits of the State of Mississippi. It is only contended that much territory within the calls of the Act of 1817 was given to Louisiana by the Act of 1812. The real question as to any island in dispute is not whether it is embraced within the description of Mississippi's boundaries in these waters, but whether it had already been made a part of the State of Louisiana.

There is, therefore, no occasion to construe the two Acts of Congress to determine what shore line was meant by the provision in the Mississippi Act: "thence westwardly, including all islands within six leagues of the shore to the most eastern junction of Pearl river with Lake Borgne." We may safely assume, for whatever purpose the fact may be used in this argument,

that the line within six leagues of which Mississippi was to have all islands is an established line.

And then it follows that every island within six leagues of this established line in 1817 which had not been previously made a part of Louisiana, belongs to Mississippi. In other words, if there is any limitation upon the plain meaning of the provisions of the Mississippi Act it is to be found in the Louisiana Act. The question is not What is Mississippi? but What is Louisiana? As stated by witness Hodgkins (R. p. 480), the Mississippi Act, standing alone, is plain except in that it requires a decision as to what are islands. We are not to determine what Mississippi should have under her Act, for that is manifest, but how much, if any, of the territory embraced within the calls of her Act does she lose to Louisiana. Mississippi contends that her Act gives her all islands within six leagues of any part of her shore; her adversary contends that she is not entitled to those within six leagues of the western part of her shore line, nor to any which may happen to be south or west of the deep water channel extending from the Rigolets to the Gulf.

Then since the meaning of the Act of 1817 is plain on its face; since it is easy to determine whether a given island is embraced within Mississippi's defined boundaries, there is no necessity to consider that Act here. Attention must be addressed to the Louisiana Act; that is the law to be construed. And in the examination of that enactment we certainly expect to find that it does not conflict with the Act of 1817. Since the latter Act plainly gives Mississippi all the islands within six leagues of an established shore line, the Louisiana Act will, if possible, be so construed as to allow to Mississippi all such islands. Every part of both Acts must stand.

Again, since we know the general purpose of the Congress in the two enactments, and know the shore referred to in the 1817 law, this court will expect to find for Louisiana a coast line—the "coast" referred to in the 1812 Act—having its location so far from the Mississippi shore line that an island cannot be within three leagues of it and at the same time within six leagues of the established Mississippi line. Because the lawmakers intended no conflict. The coast line of Louisiana within three

leagues of which all islands were to belong to that State, was, in the eyes of the lawmakers, so located that no such island could be within six leagues of the Mississippi shore.

Our purpose now, therefore, is to locate the Louisiana "coast" referred to in the Act of 1812. From the said Act of 1812, it appears that the State of Louisiana was to be erected out of "part of the territory or country ceded under the name of Louisiana by the treaty made at Paris on the 30th day of April, 1803." Nothing was intended to be embraced in the new State of Louisiana which was not understood at that time to have been ceded to the United States by France in 1803. It will hardly be contended even by counsel for Louisiana that it was the purpose to make the new State of Louisiana embrace any territory which was not agreed by all to have been ceded by the treaty of 1803. "The territory or country ceded under the name of Louisiana" was the territory which France and Spain and the United States agreed upon as being embraced in the said treaty. It was the "Louisiana" claimed by France in 1803 and referred to by President Jefferson in his message to Congress hereinafter discussed. The new State of Louisiana as created under the said Act of April 6th was to embrace no part of West Florida and no part of that country north of the Lakes or otherwise described by President Jefferson in his said message as being probably a part of the territory ceded by Spain to France in 1801 and by France to the United States in 1803. No doubtful territory was intended to be embraced within the limits of the original State of Louisiana. There was discussion and hesitation when it was proposed by the Act of April 14th, eight days later, to add to the State of Louisiana the territory between the Mississippi and the Pearl and south of the 31st parallel. It was suggested that this addition should not be made and this territory should not be included in any state until the title of the Federal Government was quieted, because it was said no state could settle the matter with a foreign nation. R. p. 1034.

Besides it clearly appears from the history of the controversy between Spain and the United States that at the time the treaty of 1803 was made it was not dreamed that the United States would get West Florida with the Louisiana Purchase. In 1812

the controversy was still on as charged by counsel for Louisiana in their replication. R. p. 95.

So it appears that not only must the territory forming the new State be within the boundaries as defined particularly by the said Act, but such territory must also have been a "part of the territory or country ceded under the name of Louisiana, by the treaty made at Paris on the 30th day of April, 1803." If the particular definition of the boundaries east of the Mississippi is doubtful then we may consider the other description and ascertain what part of the country called Louisiana in the treaty of Paris was located on the east bank of the Mississippi. For this purpose it is necessary to go back prior to 1763. Up to that date, for more than half a century, France had owned all the country in that part of the world. She owned what was afterwards West Florida and Louisiana. She necessarily owned the territory now in dispute between these two States. On that date, the boundaries between the French and British possessions was established along the middle of the Mississippi River down to the Iberville, "and from thence, by a line drawn along the middle of this river and the Lakes Maurepas and Pontchartrain, to the sea." This line was intended to give to Great Britain everything "on the left side of the River Mississippi, except the town of New Orleans and the island on which it is situated," which said island was to remain to France. R. p. 1010. This boundary line from Mississippi eastward through Iberville and the Lakes is the one adopted in the Act of 1812 and is the one which from 1763 to 1812 formed the boundary of Louisiana east of the Mississippi. It will be noted that it is not an accurate description. The line from the Mississippi eastward was only intended to cut off the Island of New Orleans. This description when it was used by the Congress of 1812 had been treated for fifty years as *one which carried nothing on the east side of the Mississippi except the town of New Orleans and the island on which it stands*. Louisiana embraced nothing on the east side of Mississippi but this island. There were no islands depending upon the Island of New Orleans. There is no mention in history of any island which passed with a cession of the Island of New Orleans. This description is the one adopted in the Act of February 20, 1811, authorizing the people of the territory of Orleans to form a constitution and state government. R. p. 1018. This

description was supposed to embrace the territory of Orleans.

History furnishes us further evidence that "Island of New Orleans" conveyed a distinct and familiar idea. The new State of Louisiana was intended to face south on the Gulf. It was intended to embrace nothing on the left bank of the Mississippi except the city of New Orleans and the island on which it stands. The description of the line from the Mississippi east is precisely that which had been used to embrace the said island. The long southern coast line which Congress intended to give to that state was not the coast of this island but the coast of the mainland.

President Jefferson in 1803 undertook "to consolidate the information respecting the present State of Louisiana, furnished to the Executive by several individuals among the best informed upon that subject." He describes the eastern boundary line of the Island of New Orleans, from the Mississippi to the Gulf "thence through the middle of that (Iberville) River, and the Lakes Maurepas and Pontchartrain to the sea." Again, he says, "the parish of Iberville then commences, and is bounded on the east side by the river of the same name, which, though dry a great part of the year, yet, when the Mississippi is raised, it communicates with the Lakes Maurepas and Pontchartrain, and through them with the sea, and thus forms what is called the Island of New Orleans. Except on the point just below the Iberville the country from New Orleans is settled the whole way along the river, and presents a scene of uninterrupted plantations in sight of each other, whose fronts to the Mississippi are all cleared and occupy on that river from 5 to 25 acres with a depth of 40, so that a plantation of 5 acres in front contains 200." And again, he says, "By recurring to the maps and examining the position of Louisiana, it will appear that the lower part projects considerably into the sea. It has in all probability been formed by the sediment brought down by the current and deposited on a flat coast. There is therefore on the east side but a very narrow slip along the bank of the river, from the sea to the Iberville."

Andrew Ellicott had the same idea about the Island of New Orleans, as shown by his map filed in this cause.

"The English had acquired the cession of Florida and all Louisiana east of the Mississippi, whose course became common

to the two nations, French and English. The former, however, preserved the isle of New-Orleans, formed by Iberville River and the lakes. * * * * The city is on the island which bears its name, 32 leagues from the mouth of the river, and one league from a narrow channel running to Lake Pontchartrain, which connects with the Gulf." *Memoir of the present State of Louisiana by Chevalier de Champigny, translated by B. F. French.*

But it would seem to be necessary only to call the court's attention to the historical fact that since the first settlements along the coasts of West Florida and Louisiana the Island of New Orleans has been known by that name. The idea which Champigny, Ellicott and President Jefferson had about it is that which the public had and which was in the mind of the authors of the Act of 1812. It was regarded as a distinct island on the east side of the River and extending not farther east than the mouth of Lake Pontchartrain at the Gulf. It was considered a narrow strip of land. The picture of it made by Bowen on his map of 1764 and especially that made by Ellicott show it as a narrow strip of land extending east to a line running north and south through the mouth of Pearl river. If the members of Congress had gone into the books all the information available would have shown them that this island extended only as far east as the Pearl river line. In the treaty of 1763 among the three nations the line between the French and English possessions in that part of the world was described as drawn along the middle of the Iberville River and the Lakes Maurepas and Pontchartrain to the sea and then it was provided that France ceded everything to Great Britain on the left side of the River Mississippi "except the town of New Orleans, and the island on which it is situated, which shall remain to France." In the letter to M. d'Abbadie, Director General and Commandant of Louisiana for France, from the King, that officer was directed to turn over to the King of Spain the French possessions in America, and he referred to the City of New Orleans *and the island on which it stands*, and he was directed to deliver to the King of Spain nothing on the east side of the River except the city of New Orleans and the island on which it stands. R. p. 1980. In a letter to James Madison in 1803, Albert Gallatin said, "The possession of West Florida, even without *New Orleans Island*, is extremely important and if it can be obtained, it ought expressly to include all the islands

within twenty leagues, or such distance as to include those which are marked on the map." R. p. 1984. In a letter to Mr. Cevallos by Messrs. Monroe and Pinckney in 1805, the *Island of New Orleans* is referred to as a division familiar to all. R. p. 1988.

The territory erected into the State of Louisiana was mainly west of the River. The Gulf coast available at that time was that from the mouth of the Mississippi west. Nothing on the east side of the river formed a part of the old Louisiana and of the Territory of Orleans except this island. It was not intended that the Island of New Orleans and all the other islands within three leagues of the eastern coast of that island should be embraced in the new State. No other islands belonged to the United States at that time. The framers of the law knew nothing of any other island; and if they had considered the question they would at once have decided that there was but one island on the left bank of the Mississippi to be embraced in the new State. They expressly adopted the historical description of this island with the same meaning which had been given it for the fifty years previous.

The presence of the idea of the distinct, segregated character of the Island of New Orleans at the framing of the Act of 1812 explains the action of the same body of men, twenty-two days later, in extending the boundaries of the Mississippi Territory so as to include all the islands within six leagues of the mainland. *It was not contemplated that Louisiana would get any islands east of the Island of New Orleans.* This conclusion must be true because under no theory of the case, in the light of no information then available, could the islands within six leagues of the mainland of the Mississippi Territory have been added to it without taking territory close up to the Island of New Orleans. While the said island was thought of as a narrow strip running along the east bank of the Mississippi, yet it was thought to extend as far east as the line running north and south through the eastern mouth of the Pearl. Immediately on the east side of the Pearl Mississippi Territory began. Under the said Act of May 14, 1812, an island within six leagues of the mouth of the Pearl belonged to the Mississippi Territory. It is idle to contend that Congress committed so great a blunder as to provide for measurements from both sides of the right angle, to the east from the Louisiana side, to the south from the Mississippi side. The con-

clusion is inevitable that the lawmakers thought a line could run south six leagues from the eastern bank of the Pearl and not touch Louisiana territory.

The present State of Louisiana, like the Territory of Orleans, and like the Louisiana purchased from France in 1803, and that ceded to Spain and delivered to her in 1763 by France, includes nothing east of the Mississippi and south of the Iberville except the city of New Orleans and the island on which it is situated. All the remaining territory was West Florida, was added to the Mississippi Territory May 14, 1812, and made part of the State of Mississippi in 1817. The Island of New Orleans was the only available territory in that quarter.

The description of the line from the River Mississippi eastward was used and is to be understood with its historical meaning—with the meaning it had in 1763, in 1803, in 1811, that is, since 1763. The city of New Orleans happens to be on the left bank; it was the only considerable town in the entire territory; it was the seat of government for the territory, and was the center of trade and travel. Every cession of the territory was carefully framed so as to save their city to the people of Louisiana. In general, the River was the eastern boundary, but enough east of the River was always embraced to carry the city along with the country on the right bank. Reference to article VII of the Treaty of Paris of 1763 shows the soundness of this contention. "And for this purpose the Most Christian King cedes to His Britannic Majesty, and guarantees to him, the entire possession of the river and part of Mobile, and all that he possesses or should have possessed, on the left bank of the River Mississippi, with the exception of New Orleans and the island whereon that city stands, which are to remain subject to France." *Only enough east of the river was attached to the west side to carry the city.* This line was never changed. It is the line adopted the same year by King George in defining the boundaries of West Florida. It is consecrated by time. And in determining this line between France and England in 1763 there could have been no difference of opinion as to whom an island belonged. It all belonged to England with the exception of one island, namely, the one on which the city of New Orleans was situated. This much was carved out of the east side territory and constituted the single

exception to the general provision that the Mississippi river should be the boundary. In 1812, on April 6th, the United States (or Spain, her predecessor) stood where Great Britain stood on February 10, 1763. She claimed as territory all east of the Mississippi with the single exception of a single island, to-wit: the island on which the city of New Orleans is situated, that having been made a part of the newly erected State of Louisiana. The State of Mississippi has succeeded to the claims and rights of the United States in this same territory. What England might have claimed in 1763 and the Federal Government in 1812, Mississippi is entitled to now.

That the description of the line eastward from the Mississippi river as used in the Act of Congress and in the preamble to the constitution of the State of Louisiana is to be taken with its historical meaning—as a description for the Island of New Orleans—is capable of further proof. The public had a definite idea of the "Island of New Orleans." The court's attention is called to the numerous references and the familiarity with which such references are made. No writer paused to explain what he meant by "Island of New Orleans." The Congress itself called it by this name with no other description. R. p. 1868. The Land Office continually made use of it in naming the land district "east of the River Mississippi and island of New Orleans." And this court in its discussion of the conflicting claims of Spain and the United States, after the Louisiana purchase, to the lands between the Mississippi and the Pearl and south of the 31st parallel, refers continually to the island and recognizes the historical meaning to be given the said description. *Foster et al. vs. Neilson*, 2 *Peters*, 300. In fact, it would seem that the preceding general description contained in the Act of April 6, 1812, would place beyond the pale of discussion the position that the particular description must be given its historical meaning. The said general description is "part of the territory or country ceded under the name of Louisiana, by the Treaty made at Paris on the 30th day of April, 1803." The "Louisiana" of the Treaty of Paris of 1803 embraced nothing east of the River except the said island, hence nothing more could possibly have been made a part of the new State. The description is to be read just as if it contained the additional provision: "but nothing on the left bank of the River Mississippi is to be embraced in the State of Louisiana except the

city of New Orleans and the island on which it is situated." For the line east of the Mississippi described in the said Act of 1812 is the historical and ancient boundary of the said island on which the city of New Orleans stands.

And again, this ancient boundary was, by another Act, recognized by the same Congress that erected the State of Louisiana. The said line was twice declared in 1763: by the treaty made in that year defining the line between France and Great Britain in that part of the world, and by the proclamation of King George defining the boundaries of his province of West Florida. And this said 1763 line was twice declared by the Congress of 1812, and in the same terms used in 1763. The island of New Orleans was still treated as an exception, a reservation, a point of departure from the general description,—the one thing on the left bank of the River attached to the right bank. This reservation or exception was made in the words of France used in 1763; West Florida was added to the Mississippi Territory,—the West Florida described by King George in 1763. The West Florida of 1763 was described as follows: "bounded to the southward by the Gulf of Mexico, including all islands within six leagues of the coast from the River Appalachicola to Lake Pontchartrain." This coast line embraced what is now Alabama and Mississippi. From that time West Florida was a well-known province and was always called by that name. In the Treaty of Versailles of December 3, 1763, it was ceded to Spain with no other description than "West Florida." In the treaty of 1819 between Spain and the United States the province was ceded under the same name with the additional description "the adjacent islands dependent on said province, * * * * are included." R. p. 1878. See the frequent mention of the province in the correspondence between Spain, France and the United States relative to the eastern limits of the Louisiana purchase not mentioned in *Foster et al vs. Neilson*: Madison to Livingston, (1801), R. p. 1982; Gallatin to Madison (1803), R. p. 1983; Madison to Monroe (1803), R. p. 1984; Instructions addressed to Monroe and Pinckney (1804), R. p. 1989; Monroe to Talleyrand (1804), R. p. 1993; Talleyrand to Gen. Armstrong (1804), R. p. 1995; Monroe and Pinckney to Cevallos, (1805), R. p. 1998; Madison to Monroe (1805), R. p. 2002; Minister of Spain to Secretary of State (1815), R. p. 2005; Monroe to Minister

of Spain (1816), R. p. 2006; Minister of Spain to Secretary of State (1816), R. p. 2007; Secretary of State to Minister of Spain (1816), R. p. 2008; Don José Pizarro to Mr. Erving (1817), R. p. 2011; Don Luis to Secretary of State (1818), R. p. 2014. And in the petition to Congress by the people of West Florida to be annexed to the Mississippi Territory (1811) it was assumed that everybody knew that province. The West Florida mentioned in these letters, the one known to history, is the province whose boundaries were defined by the King of England Oct. 7, 1763. And it was this same territory that was added to the Mississippi Territory at the instance of the inhabitants of West Florida by the Act of May 14, 1812. That the island territory of West Florida was clearly intended to be added by the said Act, is apparent when it is observed that no further addition was ever made to the Territory and five years later when Mississippi was created out of the western half of the Mississippi Territory its water line was made to follow the south line of West Florida. If West Florida, in 1763, was so framed as to embrace what is now disputed territory, the State of Mississippi embraces it.

This position may be further strengthened by an examination of the descriptive words used in the Proclamation of the British King in 1763 and those used in the Treaty of Paris of that year, and in the Treaty of Paris of 1803, in the Act of February 20, 1811, and in that of April 6, 1812. West Florida included "all islands within six leagues of the coast from the River Appalachicola to Lake Pontchartrain." R. p. 1979. The mouth of Pontchartrain was the eastern extremity, on that line, of the island of New Orleans. That lake was regarded as emptying into the Gulf of Mexico at that point. No islands were considered as being attached to that island. The coast line of West Florida extended westward to the island of New Orleans, and the eastern water line of that island was supposed to run south from the mouth of Pontchartrain, and of the mouth of the Pearl, the mouth of Pontchartrain and of the Pearl being at the same point. The West Florida description necessarily included islands (if any there were) along the eastern water line of the said island of New Orleans; it included every island within the 6-league limit except the Island of New Orleans itself however close such other islands might lie to that on which the city of New Orleans stands. The King of England had the right to do this since France had

reserved nothing east of the River except that one island. And the said treaties and the Acts of 1811 and 1812 use terms which clearly indicate that the mouth of Pontchartrain marked the eastern extremity, on that line, of the island of New Orleans. In all these descriptions Pontchartrain opens into the Gulf. Proceeding eastward from the Mississippi with the line, the authors of the treaties and laws stopped when they carried the description to the mouth of Pontchartrain. Thence eastward the country was known as West Florida; the line extending from the River to that point cut off the island. South of that line was the island of New Orleans, the one island going with the west bank of the River. Think of Spain while in possession of Louisiana after 1763 attempting to claim anything east of the Mississippi except the city and Island of New Orleans! How would Great Britain, in 1765, have entertained a contention on the part of Spain that the latter government owned the islands off the coast of the Island of New Orleans? The claim of Louisiana as against Mississippi can be no stronger nor better than such a claim by Spain in 1765.

That part of the coast line of West Florida from the most eastern junction of Pearl River with Lake Borgne to Pontchartrain now belongs to Louisiana. The selection of the Pearl for the eastern boundary of Louisiana was doubtless influenced to some extent by the discovery that the island of New Orleans extended that far eastward as shown by Ellicott's map herein-after discussed.

The testimony taken by Mississippi to prove that this historical meaning is the one which tradition says was the contemporaneous understanding of the laws creating the States is of considerable weight. Witnesses for Mississippi many of them testifying as to information received fifty years ago say they heard it from "the old people" or "the old-timers" or "the old settlers" that all the islands claimed now by Louisiana and being within the 6-league limit are within the limits of Mississippi. They all say they have heard from these old people that Mississippi included every island within eighteen miles south of her coast. This is valuable testimony,—especially in view of the fact that no witness (with one or two exceptions) has said that it was ever considered by the old people to be a part of Louis-

iana. Louisiana did not attempt to show what tradition says as to her limits. She permits the proof of tradition offered in support of Mississippi's claim to stand unchallenged, to be accepted by this court at its face value. As far as this record shows, tradition tells but one story about it. B. R. Clements, a boatman, 74 years old, fished among these islands as early as 1851. He says: "it has always been my impression and all the boatmen's impression that Pearl river was the dividing line between Louisiana and Mississippi running due south." R. p. 1206. Cross-examined as to whether the line south from the Pearl is straight he said: "Well, Judge, that way we haphazard that. We say Pearl river runs due south. It might run southeast, or east southeast or somewhere around there. We never mentioned anything of that kind, but the supposition was among the boatmen (1851 to 1862) that this was the boundary line between the two States." Asked, "And that was the prevailing idea among the fishermen, you say?" he answered, "Yes, sir." And "That the line was due south 18 miles from Pearl river?" he answered, "Yes, sir." R. p. 1216. John Walker, a boatman, 71 years old, was asked: "Could you say whether or not the deep water channel line has ever been regarded as the dividing line between Louisiana and Mississippi?" He answered: "I never heard of it until this controversy arose between the two States. I always heard and always considered that the boundary line was due south from Pearl river 18 miles. I always did so consider it and always heard it spoken of in that way until this lawsuit." R. p. 1270. This witness says, too, that while he lived in New Orleans (1867), he and others thought that the jurisdiction of Mississippi extended to the mouth of the River, which idea was doubtless a remnant of the old understanding that Louisiana had nothing east of the River except the one island on which the city of New Orleans stands. R. p. 1274. Frank Fountain, 70 years old, an oysterman, on being asked about the line said he knew nothing only what the old people told him. "Q. What did the old people say? A. They said that the line was 18 miles south of Pearl river mouth. I don't know it though. I cannot prove it. Q. How old were you then? A. About ten years old." R. p. 1308. This witness says he heard it from old people as early as 1844. J. B. Fountain, 67 years old, testified: "Q. Where did you hear that the line was,

Captain? A. I have always heard that the line was 18 miles south of Pearl river. That is what I have always heard. Q. Have you regarded it as being 18 miles south all your life? A. No, sir, that is what I have heard, but I am not certain about it. Q. How have you regarded it? A. All the old settlers used to tell me that that was the limit." R. p. 1314. J. B. Moran, 68 years old, born and raised on the coast and travelled these waters when he was ten years old, says his father told him 60 years ago that the Mississippi line ran south 18 miles from the mouth of the Pearl. His father lived there all his life and would be about 90 years old if now living. He says, too, that the people along the coast always understood it as his father explained it to him. R. p. 1341. Eugene Tiblier, Frenchman, 63 years old, raised on the coast, his father having lived there before him, says that he has always been told that the line runs south 18 miles from the mouth of the Pearl. His father would be 93 years old if now living. R. p. 1352. Richard Lanus, 57 years old, had always heard the same tradition as to the line. R. p. 1376. Charles Williams swears to the same thing. R. p. 1397. Peter Anglada, 40 years old, born and reared on the coast says: "My old father told me that the dividing line was Pearl river and that it runs 18 miles south, as I always thought that." His father would be 76 years old if living. R. pp. 1421, 1423. Wilmer Mathieu, 43 years, said "I considered the line and I have always heard that the line was 18 miles south of Pearl river." R. pp. 1435, 1438. U. Desports testifies to the same understanding "that the line was due south 18 miles from Pearl river." R. p. 1452. Earnest Desports, 51 years old, swears to the same general understanding. R. p. 1457. His grandfather came to the coast in 1825. T. R. Friar had lived at Ocean Springs 50 years and had "always heard that Pearl river was the line and from there running south." R. p. 1462. A. Ryan, 50 years old, commenced oyster fishing about 1870. He says, too, "I have always heard it said you know that the lines run south from the river straight out." R. p. 1466. He says he speaks entirely from what he has heard. A. Beugez, 45 years old, lived on Cat Island eleven years. Always heard that Isle a Pitre is in Mississippi and that the boundary line runs south from mouth of the Pearl. R. pp. 1469, 1470. J. B. Beugez, 48 years old, said: "I have heard a good many times that the line ran from east Pearl river south * * * *

about 17 or 18 miles. That is what I have heard . . . ever since I was a little boy. I have always heard my folks say so. That is, the old people." R. p. 1473. E. Ladnier, 37 years old, said: "I always heard that the line run due south from the mouth of Pearl river . . . 18 miles." He said this is the tradition. R. p. 1475. F. P. Lizana, 45 years old, had heard his father say that these islands within six leagues of the coast are in Mississippi. His grandfather was a Spaniard and his father would be 89 years old if now living. R. pp. 1512, 1513. Capt. S. R. Thompson, 65 years old, born on the coast immediately north of the disputed area, boatman since 1867, said: "Well, the dividing line between the two States has always been understood with me and most of the captains that I talked with to be eastern Pearl river. The line followed this river while it flowed in its banks, and after it left its banks and emptied into the lake we thought the line extended due south 18 miles." R. p. 1524. K. L. Thornton, 49 years old, lived on the coast of Hancock county for the last 40 years. He says: "Well, as far as I can understand from hearsay and otherwise they have all claimed that the southern boundary is 18 miles from the shore, though it was not definitely located at any particular point. That is, I have never heard them speak of any particular islands or particular marshes or coast or anything else as being the southern boundary, but we have always spoken of it as being 18 miles from the shore." R. p. 1545. He says, again: "My recollection was from hearsay when I first came down to the coast as a child," and that "this was the general acceptation amongst the fisherman and people along here." He says, too, that he thinks all those people from whom he heard it 40 years ago are dead. Fred Eleuterius says the general understanding has always been, as far as he knows, that the line runs 18 miles south of the mouth of Pearl river. R. p. 1575. Cross-examined: "Where did you derive your information about the southern boundary of Mississippi being 18 miles south of the mainland? A. It was hearsay. Asking older men than myself about it. The boatmen." R. p. 1577. To the same effect is the testimony of Capt. George McCaughan, a seaman, 63 years old, born and reared on the coast. R. p. 1612. J. A. Breath, 58 years old, always understood that the line runs 18 miles south out of the mouth of Pearl river. R. p. 1645. Pascal Luzzi, born in Rome,

1855, came to this coast 1872. He says when he was among these marsh islands within six leagues of the Mississippi shore he always understood he was in Mississippi. "The old time people told us that we were in the State of Mississippi." R. p. 1652. He says they told him that 30 years ago.

It will be noted that we have quoted those witnesses who had the idea that the Pearl river extended is the line. This is as strong proof of the existence of a tradition as could well be offered. The "old settlers," the "old people" and the "old time people" from whom these witnesses received their information were contemporaries of the authors of the Acts of 1812 and 1817. Their impressions were made at the time of the publication of the laws and the creation of the States. What the public thought at that time, it is safe to assume, is what the Congress intended. The said proof is overwhelming.

And the said tradition, being in perfect accord with the historical account, the two—tradition and history—support each other. They speak the same truth. The conclusions we have drawn from the history of the lines were known to the public of 1812 and 1817, and have been transmitted from father to son, to the third and fourth generation.

No witness for either side says that any tradition gives these marsh islands to Louisiana. As we have already suggested, it does not appear that the people of that section ever thought of claiming them for Louisiana except in so far as such claim may be shown by the application made to the land department under the Swamp Land Act, and this transaction was probably known to no more than a dozen people. It stands to reason that the settlers knew of the limited extent of Louisiana east of the Mississippi—that nothing on the left bank of the River belonged to her except the one island. This understanding and the Pearl river boundary idea have been in the same minds all these years and they belong together.

The island of New Orleans, well defined, segregated, set apart, the only territory of the ancient and modern Louisiana east of the River—this *one-island* idea, could not live in the same mind with another idea that the islands along the coast of this single island belong to it and go with it. But it could be entertained

along with the general understanding that the ancient West Florida and the modern Mississippi includes everything except the one island reserved to Louisiana. "New Orleans and the island on which that city stands." These are the words of history and of tradition.

This truth could not be ignored by counsel for Louisiana in their pleadings and proof. Its presence with them at every stage of the proceedings is manifested by this record. They do not claim Isle a'Pitre or any marsh island because it is within the 3-league limit. They contend that it is a part of the original island of New Orleans, a part of what they now call mainland. They undertake to show that these marsh islands have been formed in recent years by the forces of nature. Why go to this trouble if they are entitled, under the Act of 1812, to the islands within three leagues of the coast of the island of New Orleans? Why depend upon the wind and waves if the Act creating the State gives to it these islands within the 3-league limit? This laborious effort on the part of counsel for Louisiana is a recognition of the truth of history that Louisiana was given but one island east of the River, and of the necessary conclusion that in order to place these islands in Louisiana in 1902 it must be made to appear that they were not islands in 1812, but were part of the *one-island* which their State received on the left bank of the River. Louisiana was made to extend across the River only to take in one island; they must therefore prove that these islands in dispute are fragments of the said one island. In this way alone can the historical description used in the Act of 1812 be made to contain them.

This same one-island idea has been entertained too by the Legislature of Louisiana and by the civil authorities of that State until the development of the oyster industry in this section. The Legislature has never defined the boundaries of the parish of St. Bernard so as to embrace these marsh islands; nor had the boundaries of the older parish of Plaquemines ever been made to surround them. Counsel were expressly requested by counsel for Mississippi to produce such legislation, but it was not produced. We infer that there is no such Louisiana statute. The legislature of Mississippi however, as early as 1857, extended the boundaries of our coast counties so as to make them embrace these islands. Nor does it appear that the civil authorities of Louisiana

ever exercised jurisdiction or claimed jurisdiction in this disputed area until a few years ago. The people of Louisiana have consistently confined their claims as citizens of that State to the *one island*. The single exception is the claiming of this island territory at the United States Land Office in 1852. And to save the territory to Louisiana it has been undertaken to weld the parts together and claim the entire territory as one island.

Suppose the Congress did not use the historical description of the line from the Mississippi eastward, but traced the line on a map and selected the description from the map on which the line was traced. We are entirely willing to take up and examine this suggestion. If the authors of the Act of April 6, 1812, did take the description of the said line from a map we will be permitted to assume that they used the names found on the map. The description to be examined is "thence along the middle of said River (Iberville) and Lakes Maurepas and Pontchartrain to the Gulf of Mexico." It is evident that if any map was depended upon it was one which ignored the Amite River and represented the Iberville as connecting the Mississippi with Maurepas. No map need apply for the distinction which does not possess this peculiarity. No mention is made of the Amite although on modern maps, and on a majority of the old maps it forms the larger part of the connection between the Mississippi and Maurepas, the Iberville flowing into it. When the second Act of April 14th was framed, the Amite was recognized in describing precisely the same line from the same extremity. And in the second place, it appears that no mention is made of the Rigolets in the said Act of April 6th, "Thence along the middle of said River and Lakes Maurepas and Pontchartrain to the Gulf of Mexico." Nothing is mentioned between Pontchartrain and the Gulf, although there are two routes some distance apart and nine or ten miles long, Chef Menteur and the Rigolets, from Pontchartrain to the Gulf. The map taken for a guide, if any, showed an open easy connection between Pontchartrain and the next waters which required no description. And in the third place, no map can be considered as a probability which called the waters into which Pontchartrain opened "Lake Borgne." Neither Louisiana Act mentions Lake Borgne. The line traced and described did not pass through Lake Borgne else it would

have been described. Again, no map can be elected which does not make Pontchartrain open easily into the Gulf. The description stops at the mouth of Pontchartrain and calls those waters the Gulf of Mexico. Let us see whether there was then extant any map which can stand the test of a trial under the Act itself. It does not appear that the maps of this section were numerous, hence it ought not to be a difficult matter to select the eligible.

Of course, we will discuss here those maps only which were in print in 1812, and which might have been examined by the authors of the Act of April 6th. And the court is asked to consider them, not for their inherent worth—for no two agree and all are wrong—but because they deal with this territory and furnished the only information pertaining to the same then available. For the purpose of this immediate inquiry, they are to be treated as primary evidence, not of the shape of the land pictured thereon, but of the character of the information which was then accessible to the members of Congress. They are as valuable for what they omit as for what they contain.

Bowen's map of 1764 represents the island of New Orleans as extending eastward as far as the Pearl, connects the Mississippi and Maurepas by the use of the Iberville, has a large open mouth for Pontchartrain into the waters next east, makes no mention of Lake Borgne, and opens Pontchartrain into the Gulf. This map might have been referred to since its description of the line is the same as that used in the Act. It was published in an atlas and was very likely at hand.

Bellin's map of 1764 pictures a solid island cut off by a channel extending nearly south from the southern part of Lake Borgne to the Gulf. It shows numerous arms of the sea and also places Lake Borgne between Pontchartrain and the Gulf. It does not represent the open sea as being immediately east of Pontchartrain. If the lawmakers had been looking at this map they would have found it necessary to describe the boundary much farther east than the mouth of Lake Borgne before reaching the Gulf. It is easy to conclude that they did not have this old map before them.

Tirion's map of 1766 does not show the Iberville or the Amite; it does not show the broad open exit from Pontchartrain into the open sea; it shows at least three mouths of Pearl River.

It represents a channel from Pontchartrain to the next waters east and calls it Pass à Guyon.

Jeffery's map of 1775 shows a narrow channel from Lake Pontchartrain to the next waters east and names it Passe à Guyon. The same criticism may be made of Lieutenant Ross' map of the same date. Besides, the said Ross map plainly marks the Iberville as connecting the Mississippi with Lake Maurepas. His map is but a copy of that made by Jefferys. And the map of 1766 taken from the London Magazine is but a copy of Tirion's map.

Lafon's map of 1806 is the one to which counsel for the State of Louisiana have given especial attention in the taking of testimony. We apprehend that this is the map which they will insist was taken for a guide when the Act of 1812 was framed. But it cannot stand to be tried by the Act itself. It clearly marks the Amite as forming the larger part of the connection between the Mississippi and Maurepas, while the original Act creating the State of Louisiana does not mention the Amite at all as forming a part of this channel. The Lafon map plainly marks the Rigolets, but there is no mention of the Rigolets in the Act of 1812. Lafon places Lake Borgne and other waters between Pontchartrain and the open sea. If the framers of this statute had been looking at Lafon's map they would not have failed to mark the line from the mouth of the Rigolets to the Gulf.

All the above named maps, Lafon's and Bowen's excepted, were made by foreigners. It is more probable that the Congress, if using any, looked to the map or maps made by persons living in this country. The contest would seem to lie between Lafon's, Bowen's, and one other map, made by Andrew Ellicott, a then recent map. An examination of these two maps, Ellicott's and Lafon's, in the presence of the Act of 1812, renders a decision easy and certain as to which of these two maps, if either, was taken for a guide.

Andrew Ellicott's Journal of his explorations and surveys had recently been published, and was official. He had been into this territory and published his journal and map as being based upon first hand information. He was paid by Congress to do the work; he made actual surveys. This journal and map were immediately at hand and we would expect to find that the mem-

bers of Congress, having special confidence in their own representative and employe, looked to Ellicott's map and journal for their information. Let us try his map by the Act of 1812 and determine whether the use of terms in those Acts and the peculiarity of the descriptions were likely taken from this map. In the first place, it will be noted that Ellicott's map gives no name to the channel from Lake Maurepas to the junction of the Iberville and the Amite. One cannot look at his map and decide whether the channel from the junction of these two rivers to Maurepas is the Amite or the Iberville. The original Act of April 6, 1812, calls it the Iberville, the Act of eight days later calls the part east of the junction the Amite. In the second place Ellicott allows a large, free opening from Lake Pontchartrain to the open sea. It does not show the Rigolets, but places the waters of the Gulf next after Pontchartrain going east. In the third place, Ellicott does not represent Lake Borgne at all and does not place any body of water between Pontchartrain and the Gulf. In the fourth place, Ellicott shows two mouths of Pearl River and shows them too immediately at the mouth of Pontchartrain, so close that there is no necessity for a description of the line connecting the eastern mouth with Lake Pontchartrain. The feature of this map which, to our mind, makes it reasonably certain that it was before the makers of the law at the time the description of the boundary of the original State of Louisiana was being described, is that the Gulf of Mexico is represented as being in direct close connection with Lake Pontchartrain. The description contained in the said original Act covers the entire distance from the mouth of Pontchartrain to the Sabine River with "thence bounded by the Gulf of Mexico." If the lawmakers had their eyes on a picture it was one which brought Pontchartrain and the Gulf together, one which showed no route to be defined from the mouth of Pontchartrain to the waters of the Gulf.

We may, therefore, with safety infer that the authors of the said Act of April 6th, used the description of the line from the Mississippi eastward as it was found in the several treaties concerning that territory with its historical meaning since there was then in existence no map which employed the same description for the line as that used in the said Act. The said maps make a stronghold of the position to which we had already been con-

ducted by history and tradition. We respectfully submit that the said position is invincible.

And if, under any view of the case, our conclusion above stated should not be accepted by the court, there remains only an alternative, to-wit: the conclusion that the framers of the Acts used Ellicott's map for a guide. That is the only map which ignores Lake Borgne and the Rigolets, gives Pontchartrain a wide opening into the waters immediately east and calls these waters the Gulf of Mexico; and is the only one which combines all these said peculiar features with a doubtful connection of the Mississippi with Maurepas.

But we are willing to accept either alternative—we are willing to stand upon the conclusion that the historical description was used, or that Ellicott's map was before the lawmakers. We have already demonstrated our readiness to accept the description with its historical meaning. And it will appear that Ellicott's map presents the several historical and traditional ideas for which we are contending: the Pearl River line extended south along the eastern water line of the island of New Orleans; the isolated, well-defined island on which the city of New Orleans stands. This map presents the picture which was in the mind of the authors of the Act. It is true to history though not strictly true to the facts. The island of New Orleans is set apart. The lawmakers looking at this map might still have employed the historical description.

Our conclusion is that the State of Louisiana was intended to embrace no territory east of the Mississippi except the island on which the city of New Orleans stands, this conclusion being based upon the following facts:

1. The description of the territory on the east bank of the River, used in the Act creating the State, is the one whose meaning was established; it is the ancient description for the island of New Orleans.

2. The same Congress that passed the said Act added all the other islands to the Mississippi Territory in the annexation of West Florida east of the Pearl to the said territory, the said province of West Florida including all islands within six leagues of the coast.

3. The Congress of 1817 erected the State of Mississippi in the western part of this territory and adopted, as a matter of course, the West Florida lines.

4. History represented the island of New Orleans as a narrow strip along the east bank of the River with its north and south line on the east side as an extension of the east Pearl river line, thus making apparent the impossibility of allowing to West Florida, or Mississippi Territory, or the State of Mississippi islands within six leagues of the eastern bank of the Pearl if any island had previously been attached to the said island of New Orleans.

5. Tradition, proved by satisfactory evidence, says that the east Pearl river line extended is the line understood generally at the time the States were formed. And no tradition says the territory was ever considered to be in Louisiana.

6. Louisiana has always confined her jurisdiction to the island of New Orleans in these waters, her Legislature having never extended the boundaries of any parish around it and her civil authorities having never exercised jurisdiction over it. The only claim ever made to ~~it~~ consisted in an application to the United States Land Office under the Swamp Land Act of 1850 and the subsequent sale and taxation of the land. And it does not appear that any Mississippian ever heard of this.

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7. The only map in existence at the time which can with reason be insisted upon as having been taken for a guide by the authors of the said Act, shows the island of New Orleans segregated, well defined, its eastern water line an extension of east Pearl river, and with the islands southwest of Cat Island close up to the Mississippi shore.

IV.

But what signifies the conclusion that the historical description of the island of New Orleans was used and that nothing east of the Mississippi was to be in Louisiana except the said island, when the said conclusion is viewed in the light of the large purpose which we have been insisting controlled the authors of the laws? It restores order and prevents a conflict between the enactments. The two great truths of history fit the two States together firmly and wisely and vindicate the justice and

clearness of vision of the Congress. Louisiana had nothing on the east of the River but the one island; her coast line with its dependent islands was and is on the south; the coast line from which measurements were intended to be made—to ascertain which this investigation was instituted—runs generally east and west; the islands within the 3-league limit which Louisiana was to have were and are “immediately south and in front of her mainland,” not on her east line, at her side door, on the coast of her island of New Orleans, in front of and south of Mississippi. It enables every part of both Acts to stand. It makes each detail to contribute its part in the accomplishment of the single purpose. It relieves the necessity of an operation upon the Mississippi Act to make it appear not to mean what it says. It locates a coast line for Louisiana, the one intended, from which measurements may be made to determine her ownership of islands, and at the same time leaves undiminished the well-known shore line of Mississippi unequivocally defined by her Act within six leagues of which she is to have all islands.

V.

In the foregoing argument we have assumed that the island on which New Orleans stands has the same shape and extent that it had in 1812 or 1763. Of course, if that island extended as far eastward as Isle a'Pitre in 1812 and the area now in dispute was part of a continuous body of solid land, part of that island, Louisiana is entitled to it. She gets whatever was then the island of New Orleans, however great its extent. If the lawmakers were mistaken as to the extent, at that time, of the said Island, and its east line was at Isle a'Pitre and not at Nine Mile bayou south of the eastern mouth of the Pearl, the Isle a'Pitre line should still be adopted. If the islands for which we are contending have been formed since the States were created we concede them to Louisiana.

We have already demonstrated, however, that the lawmakers thought this territory was composed of islands. They thought the east line of the island of New Orleans was south from the eastern mouth of the Pearl. We apprehend, therefore, that if there was in 1812 a channel on the line south from Pearl river separating the mainland of New Orleans island from the marsh

territory, this line will be accepted although there might be room for difference of opinion as to whether the bodies of land, at that time, were properly called islands, and although it might further appear that the said marshes originally formed a part of the said large island. The Congress considered them islands.

We will now proceed to inquire whether the evidence proves that these islands have been formed since 1812. Testimony is offered as to subsidence; as to storms; as to particular changes.

It will be observed that the consensus of opinion among geologists is that all this peninsula was formed by the Mississippi river from its deposits. No geologist guesses at the age of this river; no one of them speculates upon the time during which it has been making deposits in these waters. All the land south of Maurepas and Pontchartrain was doubtless constructed from these deposits. Since this disputed area was created, the river has built more than a hundred miles of banks with thousands of acres of land. This has required so many thousand years that the most daring geologist will not undertake to fix the limit of time. And although this land was formed so far back in the history of the world; and although we find it now broken up into well-defined islands, yet counsel for Louisiana insist that this court should conclude that it has been so broken up within the last century. Can such remote and doubtful facts be proved by mere speculation, itself indefinite and doubtful? Or by the hearsay of map-makers? The burden certainly is upon Louisiana to prove that these islands were, in 1763 and 1812, a part of the Island of New Orleans.

The testimony of Maj. B. M. Harrod, a member of the Isthmian Canal Commission, is eminently fair. He says lines have been run from Baton Rouge down into the Parish of St. Bernard, but the changes were not perceptible. While it is generally believed that the subsidence is going on it has never been discovered by instruments. He knew the country before 1850, but has noted no change within this disputed area. Asked, "Well, do you believe that since the years 1812 and 1817 the conformations of those islands have been materially changed either by action of tidal waters or subsidences or by any other agencies, and we mean by those islands in this question those nearest and adjoining Saint Bernard—the mainland of Saint

Bernard parish?" He answered, "I could not give any answer about the time, since 1817 or 1818. I believe that peninsula was formed by the river deposits being placed out in a shallow sea that had tidal movements and instead of forming a solid peninsula it left these open areas through it for the tidal movements in and out of Lake Borgne and Lake Pontchartrain and that those lakes or spaces of water have been enlarged since their formation, by subsidence. That is my opinion about the formation of that peninsula; that water areas were left there when it was originally formed and have subsequently enlarged by subsidence." And then he said the process has been going on "For centuries I have no doubt." R. p. 135. Capt. Thomas Summerall noted changes at Creole Gap and at the mouth of Three Mile Bayou made by the 1893 storm. R. p. 243. Capt. J. D. Railey says Three Mile bayou was only about 100 feet at mouth when he first knew it and now it is three times that. R. p. 250. Also noted changes between 1869 and 1889 at Point Comfort and Martin Island. Says Three Mile bayou was so called in 1869. Always 2 1-2 feet of water through Three Mile bayou south at very low tide, and 4 feet at high tide. Says the general body of the island area is now just as it was in 1869. R. p. 259. Charles Sanger testifies as to changes within the last 10 years. R. p. 260. To the same effect is the testimony of William Dillard. R. p. 266. Says Nine Mile bayou is 30 to 40 feet deep in one place. R. p. 277. Capt. Alfred C. Ruiz made trips down Nine Mile bayou in 1874. R. p. 294. Round island has disappeared since 1876, and there have been changes along Nine Mile bayou. R. p. 295. Nine Mile bayou has a very deep channel. Has gone through the marshes with the Majestic drawing 3 1-2 feet of water. Alfred Monier, in January, 1904, walked from Malheureux Point to Isle a'Pitre, being carried across the bays and bayous by George Thiel. It is a hard coast line, and about 50 miles long. Shore from 1 1-2 to 2 feet above sea level. Had no high tides. R. p. 326. William C. Stubbs, professor of agriculture in Louisiana State University, 58 years old, says the whole Mississippi Delta was formed by deposits; that Maurepas and Pontchartrain are fragments of the Gulf; that Louisiana belongs to the recent or present geological period, and that this *period may cover five thousand or five million years.* Says it is the opinion of geologists that the Mississippi Delta on the Gulf

sinks at the rate of four feet a century; that the area now in dispute sinks less perhaps; that the bed of the Mississippi Sound, the land under water, subsides at the same rate with that above water, and says he is certain there have been changes within the last hundred years, but could not call them great changes. R. p. 332. John McGraw, a purchaser of lands in disputed area from Louisiana says St. Joseph island has disappeared. Knows of changes at Creole Gap, Three Mile bayou and Grand Pass. He and other witnesses speak of a tradition as to how Creole Gap was formed. (But, it will be noted, there is no tradition which tells of the creation of any other pass or bayou along from Petite Pass to Isle a'Pitre or of the mainland of New Orleans island ever including this territory.) R. p. 409. J. B. Baylor, connected with United States Coast and Geodetic Survey since 1873. First survey by United States in the 50's. Made surveys on Mississippi coast and outlying islands in 1903 and found there had been no marked change along the line from Malheureux Point to Isle a'Pitre in last 50 years. "As a general proposition my work showed conclusively to my mind that there has been no marked change in regard to the washing away of that coast in 50 years." R. p. 416. Says the original topographic and hydrographic sheets made 50 years ago are on file in the archives of the Coast Survey and that a re-survey would show precisely what changes have taken place within the last 50 years in the widening of bayous between Malheureux Point and Isle a'Pitre. R. p. 434. William C. Hodgkins, an assistant in the Coast and Geodetic Survey, with which department he has been connected since 1871, says the Land Office surveys are shown by topographical maps, and that a survey of country south of Lake Borgne and the Sound was made in 1845. R. p. 483. James Wilkinson, 48 years old, ex-district attorney for parishes of St. Bernard and Plaquemines, testifies in a general way about the agencies at work to sink the whole of the Louisiana country. R. p. 525. Joseph C. Gilmore owns a part of Isle a'Pitre and was on the island as early as 1881. Has never noted any material change. R. p. 541. Capt. A. S. Cowand, 65 years old, says he knows every bay and pass in the disputed territory, having been in it frequently since 1853. He camped on Half Moon island in 1857. Then there were several islands known as Malheureux "on the corner of Petite Pass, on the Lake Borgne side." R. p. 545. These islands have disap-

peared. In the marsh you frequently find more than 20 feet of water. There have been changes at Nine Mile bayou, it being about double its width in 1853 and 1857; Three Mile bayou has widened 150 feet in the same time. Heard the lighthouse keeper say, in 1858, that he remembered when Petite pass was made. Noticed that shell banks at Johnson bayou, Turkey bayou and Grand Pass have disappeared. Creole Gap has been formed since 1857. Has noticed changes at Sundown island, Brush island, Martin island, Elephant pass; every island in the marsh has decreased in size. Says Lafon's map of 1806 comes nearer to showing the territory as he first knew it than Mississippi Exhibit A. He does not recall any bayou similar to that marked "B. Guillemard" on the Lafon map. R. p. 561. His father settled in this section in 1832, and he told witness of the tradition that the early French settlers named Isle au Pied from the discovery of a great many tracks on it. R. p. 566. Has known all these passes and bayous running south from Mississippi sound since 1857 and they were well-defined water courses when he first knew them. Knew these islands in 1857 and believes they were smaller then than in 1812. Fished oysters in the marshes in the 50's. Can trace on map No. 17 the route he followed in 1857. Mississippi Sound, Lake Borgne and the bays had the same names in 1833 when his father settled here that they have now. He is of the opinion that the territory contained much more land and much less water in 1812 than it contains now. R. p. 597. C. Donovan, civil engineer, 53 years old, for 25 1-2 years employed to inspect the work done by Eads on the jetties. Says the subsidence of the land necessitated a change of the plane of reference by which the depth of the jetties was determined. Thinks the subsidence in the country around Port Eads amounted to 1.54 feet in 25 years, and that there was no change in the Gulf level. R. p. 646. Ernest Cucullu, 69 years old, born in New Orleans, lived in St. Bernard parish all his life. Went through Nine Mile bayou in 1846, but no farther into the marsh; is not certain, but thinks there was more land there in 1846 than is shown now by map 17; Nine Mile bayou was 500 feet wide at mouth when he first saw it, and was a deep bayou. R. pp. 670, 671. Charles Marshall, superintendent, Louisville and Nashville railroad, says the marsh traversed by his road is becoming higher and firmer. R. pp. 691, 692. Hugh C. Smith, civil engineer, 45

years old, employed in 1895 to make a map of St. Bernard parish, the said map being No. 52. He made this map without new surveys, relying mainly upon the surveys by Powell and Richardson, made in 1843, '44, and '45.

The testimony mentioned in detail above was offered to prove subsidence and particular changes. But the proof of changes is strikingly uniform in that the witnesses tell of the same changes—the principal being at St. Joseph island, Three Mile bayou, and Creole gap. They all know about these three and some of them tell of a few others. Such testimony goes only to prove conclusively that no general change has been going on and only such particular ones as occur wherever bodies of land and water rub together. The general change is in theory only. The fact that these three prominent ones are remembered by all indicates that they are the only noticeable ones and that they stand out prominently.

The proof offered as to particular changes certainly does not prove that these islands did not exist in the same general shape and size two hundred years ago. The testimony may be sufficient to raise a doubt as to whether they were islands one thousand years ago, but it certainly falls far short of proving it with such certainty as to justify an assumption of the fact. There is no tradition as to the formation of Nine Mile bayou. It was a large water course in 1843, deep and nearly a quarter of a mile wide. See Louisiana Document No. 43, R. p. 1047 f. The same surveys of 1843, '44, and '45, show Three Mile bayou with the prominence it has on the latest maps. See R. p. 1047 b. In fact, counsel for Louisiana have offered opinions of witnesses to prove subsidence and particular changes, and at the same time have offered reliable facts which prove conclusively that there have been no material changes. Hugh C. Smith prepared his map of St. Bernard parish in 1896 and used data collected by Powell and Richardson 50 years before. He made no new surveys. He had at that time no such information as to great changes due to storms or subsidence as, in his judgment, called for a new survey or rendered the map of 1846 inaccurate and unreliable. The police jury of St. Bernard took the same view of it. They knew of no phenomena at work among the marsh islands which likely had changed the face of the country. They accepted Smith's map based upon surveys and topographical maps made 50 years

before. And this court needs only to compare the township plats prepared by Richardson and Powell in 1843, '44, and '45, with the latest maps of this territory to be convinced that within the last 60 years there have been no noticeable changes in the topography of this disputed area. Mr. Baylor said that the information collected in 1855 by the Coast and Geodetic Survey could be had and that from this information it could be determined in detail and to a certainty what changes have taken place. This information was not furnished. This witness made surveys and established lines in 1903 along the southern line of Mississippi sound, and he says he is certain there had been no material change within the previous 50 years. This testimony is definite and reliable, as are also the township plats prepared by the Land Office of the United States in 1846. This, too, although great storms have visited this section within the last 50 or 60 years, especially in 1893.

The theory of subsidence as bearing upon the question we are here considering is wholly unreasonable. It is the opinion of geologists that the Mississippi river is responsible for the formation of all this island territory west of Cat Island; that all of said land area was formed from deposits made by the waters of the said river; that the said land territory was built up by the bayous that ran from the River and especially Bayou Terre Boeuf, which divided as it extended eastward and formed Bayou la Loutre and Bayou Terre Boeuf. It is their theory that these marsh islands were formed from deposits made by these two bayous. R. p. 334. But their waters left the River *at a point 50 miles or more southwest of this area in dispute.* R. p. 337. The point at which these bayous enter the Gulf is represented now as it has been during the entire period covered by the history of the country. It is perhaps 25 miles from Isle a'Pitre to either of these bayous at the nearest point. To influence the formation of land in the neighborhood of Grand Pass these bayous would, of necessity, have flowed northeast for 20 or 25 miles. But their course as they approach the sea is southward, and their general course is southward. The truth is, in applying their theory to the conditions, these bayous are the only streams counsel can make use of, these being the nearest ones to the territory for whose existence they desire to account. And the attempt to use these bayous 25 miles southwest to reconcile the theory with the facts

only demonstrates, not the unsoundness of the general theory, but the futility of any effort to point out and give a name to the very agency employed by the Mississippi River in making the deposits in the vicinity of Three Mile bayou, Nine Mile Bayou and Grand Pass. These deposits were made by a prehistoric stream. It did its work and disappeared. No trace of it is left. This was evidently before the country south of New Orleans was constructed. The river builds south, east and west; it does not build north. The general tendency of the water in that section is southward. This territory in dispute is on the same parallel with the city of New Orleans, which is about 100 miles from the mouth of the river. It is older than the territory southwest through which Bayou la Loutre runs. We are certainly safe in saying that it is 1000 years old. Since it was formed and the River passed on in its encroachment upon the Gulf, no deposits have been made and no agency has been at work to supply what has been lost by subsidence. If it has subsided four feet a century it must of necessity have stood up originally some 40 feet above the sea level.

We respectfully submit that the proof of subsidence in theory cannot stand when viewed in the light of the facts themselves. The subsidence is going on at the mouth of the river, in the books, and in the minds of witnesses. The enormous height to which the oldest territory in that section must have been constructed *by deposits* to enable it to hold its head above the water after the subsidence of centuries—this suggestion kills the theory. If the people of Louisiana believed in it, lands would decrease in value and inhabitants would flee for their lives. The country would all sink except that about the mouth of the River. *In the course of time the mouth of the River would be an island far out in the Gulf.* The only way to save the Delta country would be to tear down the levees and permit the deposits to continue. No such catastrophe is contemplated. The theorists do not fear their theories. Their experience reassures them. The theory may be correct, the figures only may be wrong. The change may be going on, but it is too slow to be taken into consideration in deciding issues between modern states. In order to reach the conclusion that the said islands have been formed within the last hundred years, it will be necessary therefore for the court to decide that much more powerful agencies were at work prior to

1845 than have been operating since that date. For it distinctly appears, independently of theories and speculations, that since 1845 there have been no such changes as to require at this time any material corrections in a map made on the former date. We think the testimony as to storms is to be given no consideration. There have always been storms on the high seas. They are not phenomena peculiar to the last century. They were operating in this territory when it was being built up and when it was easy to break through and tear down, and they very likely reserved the paths for their winds and waves when they yielded up the original ocean domain, as suggested by Maj. B. M. Harrod. R. p. 135. It has not been attempted to prove any change as having occurred prior to 1845. And since we had a survey in that year and another in 1903 by disinterested and competent men, no uncertain testimony need be considered. The results of the two surveys will be depended upon. The fact remains that this territory was broken up into islands when the first survey was made 60 years ago, and nothing has happened to call for a change of the maps made from the said first survey.

Numerous witnesses were produced by Mississippi to prove that there have been no changes among these marsh islands within the life of men now living, except those prominent ones described by witnesses for Louisiana. B. R. Clements said there has been a great change at Grand Pass since he first saw it in the 50's. He went all through the marshes in the 50's with a boat drawing from 2 to 3 feet of water. R. p. 1228. William Gorenflo has been acquainted with this territory since 1858; went through Grand Pass in 1869 with vessel drawing 5 feet; has observed no material changes in coast line from Malheureux Point to Isle a'Pitre. R. p. 1235. He says it is more than nine miles from Nine Mile bayou westward to the habitable part of the mainland of Louisiana. R. p. 1246. I. C. Morrison has known the marsh since 1868. The bayous are about the same now as they were then. R. p. 1284. John Walker went from Chandeleur Sound through Three Mile bayou in 1868 with boat drawing 4 feet and found no less than 7 feet anywhere. Has noted no changes along line from Malheureux Point to Isle a'Pitre. R. p. 1272. James Tapper saw Grand Pass in 1867, and again in 1903. Noted no material difference. R. p. 1323. John Goodier says there have

been no great changes since he first knew the territory in 1876. R. p. 1360. To the same effect is the testimony of Richard Lanus. R. p. 1371. Mr. Martinez, 60 years old, lived 25 years in St. Bernard parish, says he has noticed no changes since 1867, only bayous widened a little at the mouths. R. p. 1387. See also testimony of Charles Williams, R. p. 1398; J. S. Wentzell, R. p. 1407; J. M. Ritch, R. p. 1412; Peter Anglada, R. p. 1421; Clement Cox, R. p. 1429; Wilmer Mathieu, R. p. 1436; T. R. Friar, R. p. 1462; A. Beaugez, R. p. 1470; E. Ladaier, R. p. 1475; S. R. Thompson, R. p. 1526; Mike Lanius, R. p. 1564; Pascal Luzzi, R. p. 1650. These witnesses offered by Mississippi and those for Louisiana have observed the same prominent changes. There has evidently been no revolution in this territory within the memory of men now living. Instead of establishing the contention that there have been subsidence and washing away to such an extent as to break up a solid peninsula into islands since the two States were formed, the evidence for both sides only serves to prove beyond cavil that during the last 60 years the general outline of the territory and of its parts has remained the same.

But in their effort to prove that when these States were erected there was a solid peninsula embracing all these marsh islands, counsel for Louisiana produce a great many maps which picture continuous marsh land from the island of New Orleans extending across the territory now occupied by numerous islands.

We now proceed to consider these maps in their character as hearsay, the character in which, as evidence, they were condemned by this court in *Missouri vs. Kentucky*, 78 U. S. 395, 20 L. ed. 116, 121. And they will be examined at this time not as proof of the boundary line between these States as shown by the coloring of islands as belonging to the one State or the other, but to discover their value as proof of change. If map-makers, from 1800 to 1845, represented this territory as part of a peninsula extending northeastwardly between Lake Borgne and the Gulf, what weight is to be given to their representations in passing upon the question as to whether, in 1812, this disputed area was composed of marsh islands and water?

In the first place, it will be remembered that no survey was ever made of this disputed area or of any of the territory west of it and north of Bayou Terre Boeuf prior to 1843. Darby

writes on his map of 1816 that this territory is little known, and Darby lived in Louisiana, it appears. His unknown land covered the entire area north and east of the said bayou. See Louisiana map No. 20. It follows that the maps of this section as evidence, hardly rise to the dignity of hearsay. They do not tell the story of witnesses who, themselves, knew the truth, but they represent the guesses made by their respective authors, or the guesses of others adopted by their respective authors.

Bellin's map, 1764, (No. 8), shows solid land or a large island immediately southwest from Cat Island, cut off by a large water course from Lake Borgne to the Gulf. He does not pretend to have had first hand information.

Tirion's map, 1766, (No. 9), like Bellin's is a creature of the imagination, and is so grotesquely inaccurate as to furnish no basis for any conclusion. One cannot tell whether the peninsula is the one we now know as forming the east shore of Lake Borne or was intended to cover the space now occupied by these islands.

Jeffry's map, 1775, (No. 10), is not hearsay. It only represents his idea of the shape of the territory. The same is true of that prepared by Lieutenant Ross, map No. 11. No. 12 is a copy of No. 9, made in 1766.

The earliest map offered in evidence which comes near to presenting, in general outline, the contention of opposing counsel, is that made by Maj. Pussin, 1830, (map No. 13). William Beer says (R. p. 218), that Pussin came to America to report to the French government upon internal improvements. It does not appear that he was ever in this locality. He represents continuous solid land as covering part of the marsh island area, but the incorrectness of his representation is shown by the township plats of Powell and Richardson based on surveys made 13 years later. And it will be observed that the records show but one storm (1837) which appears to have reached this territory between 1830 and 1843. R. p. 1038.

The superficiality of maps and the unreliability of map-makers are forcibly demonstrated by a comparison of map No. 15, made in 1854, published in Lange's Atlas of North America, with the topographical maps made by the Land Office in 1846. The said map No. 15 shows this peninsula as continuous

solid land nine years after actual surveys had been made and published showing it broken up into islands.

Lafon's map of 1806, (No. 19), presents this territory as forming a solid peninsula, but the glaring imperfections of it show that he knew nothing of the details. He has a bayou, Guillemard, running northeast through his peninsula from Lake Borgne. Darby's map, however, of ten years later shows no trace of this bayou; nor does that of Melish of 1816-1818, map No. 57.

It will be noted that these men knew of Lake Borgne and had to give it an eastern shore, and this shore had to be a peninsula. As they broaden that lake at its northern end they swing the said peninsula to the east out of the way. It is really the peninsula we now know as extending northward between Lake Borgne and Nine Mile bayou. This criticism may be made especially of the maps just mentioned and of Melish's map of 1820 (No. 22), Mitchell's map of 1834 (No. 24), Graham and Tanner's, 1834, (No. 25), H. S. Tanner's, 1837, (No. 26), and La Tourrette's of 1839 (No. 27). All these maps are in hopeless conflict with the facts as disclosed by Powell and Richardson in 1843, '44, and '45. It is impossible to believe that the long peninsula shown on these maps was suddenly broken up into islands immediately before the survey in the 40's. And if we find that the map-makers of the years immediately prior to the said survey were altogether wrong, why should we be compelled to accept what the earlier ones say? Is it more likely that Lafon, Darby and Melish were right in 1806 and 1816 than that Melish, Tanner, La Tourrette and Mitchell were right from 1820 to 1843?

The truth is, land was plentiful in those days. Grants were made extending from ocean to ocean. It was only the best that was carefully explored. There was more of the best than could be claimed or settled. This waste country received no special attention. Andrew Ellicott is the only map-maker who, we are certain, was ever in the territory itself. He showed the continuous land of the Island of New Orleans as ending about Nine Mile bayou, or nearly due south from Pearl river, as Bowen had in 1764, and as Cary's Atlas presented it in 1814.

This peninsula forming the east shore of Lake Borgne is a marsh now just as it was a century ago. There is not a planta-

tion on it. The plantations extend but about fifteen miles from the river. R. p. 679. Nearly all the old maps show a prominent bayou running through it and connecting with Lake Borgne and Black bay. It is called by some of them Bayou Chersonese and by others Bayou Guillemard; and those that call it Bayou Chersonese name the connection with Lake Borgne Guillemard. No definite trace of this bayou remains on modern maps. If the peninsula through which these old maps extend this bayou were only pulled westward nearer to the mouth of the Pearl it would fairly represent the continuous land as it now appears.

But the fact remains that as far back as our definite information extends this area consists of islands and water. If these maps were approximately correct when published then the change was revolutionary in its nature. On the other hand, if we assume that there has been no revolution, no unusual disturbance, and that geological changes have been permitted to pursue their usual plodding way, then these maps made prior to 1843 were wrong when published; because if the progress of the waters in reclaiming what was lost ages ago was no more rapid prior to 1843 than it has been since that date then it has been centuries since there was continuous land from the Mississippi to a point three miles southwest from Cat Island. If the slow advancement of the water upon the land scarcely has made itself perceptible since 1843, may we not measure back another 60 years and conclude that the difference between a modern map and a correct one of 1783 would be barely observable? The court is asked to believe that this was continuous land prior to 1843, because map-makers who personally knew nothing of the country took it upon themselves to picture it that way. This, too, in the face of the positive proof as to the rapidity with which changes are in progress in this same territory.

And our conclusion that since no such changes as need to be noted on maps have occurred within the last 60 years, therefore no great change in the relative extent and locations of land and water occurred during the 60 years immediately prior to 1843, is further strengthened by the consideration that the encroachment of the water upon the land was necessarily much more rapid after it was well begun than before. After a channel has once been made across the land it rapidly widens and deepens. The difficulty is in making the beginning. It is illustrated by

the rapid widening of Creole gap after the passage was cut through. Now, the surveys begun in 1843 show the water-ways then well established throughout this area. The islands and waters have retained their relative shapes and sizes, for the purposes of map-making since that date. It is the veriest speculation to name any period of time within which there were no islands nor bayous in this territory.

IV.

If our conclusions should be accepted by the court there will then remain no difficulties. The islands within six leagues of every part of the shore line of Mississippi will be given her, those "immediately south and in front of her mainland;" and Louisiana will receive those immediately south and in front of her mainland. The two Acts will stand side by side; the intention of the lawmakers will be executed. Such construction of the statutes will allow the presumption that the authors of the 1817 Act took into consideration the 1812 Act, and will avoid the absurd conclusion that the Congress gave to Mississippi territory which had been formerly given to Louisiana, and the unjust conclusion that it was intended to give to Louisiana an unequal and unjust share of the advantages of a seashore. Both conclusions will be avoided if possible. "Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion." *Lau Ow Bew vs. United States*, 144 U. S., 47, 36 L. ed., 340.

It will be observed, too, that the question of jurisdiction over this disputed area is of much greater consequence to Mississippi than to Louisiana. It is from 20 to 40 miles from the settled portion of Louisiana, and inconvenient to reach from that State. It is immediately in front of Mississippi's front door. The whole coast of the latter State is habitable, and has had settlements on it since 1701. Almost the entire coast is divided up into residence lots like city property, and, in fact, it will be a city from the one extremity to the other within a very few years. R. p. 1744. The territory is almost in sight of the Mississippi shore and can be reached by sailing directly across the sound. If the deep water channel should be declared by the court the dividing line, this thickly settled, richest portion

of Mississippi would, for a great part of its length, lose all the advantages of a sea front. This loss would be added to Louisiana's extensive coast line and Mississippi would be cut down to perhaps 50 miles.

In fact, as far as Louisiana is concerned, the question involved is one of property and not of jurisdiction. Her interests would be promoted by the establishment of the line for which she is contending only to the extent of the value of the territory as property. Her inhabitants are far away from it. It is not necessary that she have jurisdiction over it for the protection of their health and peace and enterprises. The record shows that Mississippi has exercised civil jurisdiction over it all these years, embraced it in her counties in 1857, and that it was never noticed by Louisiana except to ask for it as property at the hands of the Land Office of the United States, and, when its *property value* was enhanced by the development of the oyster industry to undertake to have her claim confirmed by this court. The proceedings leading up to the institution of this suit indicate that it is the *property in*, and not the *jurisdiction over* this territory which is really the aim of this litigation.

On the other hand, the convenience and welfare of a great and prosperous part of Mississippi are placed in jeopardy. It is an attack upon the sovereignty of this State. It seeks to take away her jurisdiction over the waters close up to her mainland and take it out of her power to protect the health and quiet of her people without great and unusual expense. The property question is of relatively small importance to Mississippi. It is the question of sovereignty with which we are mainly concerned.

As shown by the township plats of 1846, Nine Mile bayou was, 60 years ago, a very deep channel and at least a quarter of a mile wide. This was large enough to be used as a boundary between great states. It flowed south into a large bay, and from there to the 6-league limit the waters were broad. R. p. 1047f. This is the line for which we contend. It coincides with the historical and traditional line running south out of Pearl river; it is the eastern limit of the old Island of New Orleans. And we respectfully submit that its adoption by this court will completely reconcile the two enactments, will declare the truth of history, and ac-

comply with the success of the large plan intended to be executed by the Congress of 1812. History, tradition, convenience and right ask for this consummation.

Respectfully submitted,

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